

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

| | | |
|----------------------------------|---|--------------------|
| ARTHUR BUTLER |) | |
| Claimant |) | |
| VS. |) | |
| |) | |
| JET TV |) | Docket No. 106,194 |
| Respondent |) | |
| AND |) | |
| |) | |
| AMERICAN STATES INSURANCE |) | |
| Insurance Carrier |) | |

ORDER

Respondent and its insurance carrier appealed the July 1, 2003 Post Award Medical Order entered by Administrative Law Judge Brad E. Avery. The Board placed this claim on its summary docket to be determined without oral argument.

APPEARANCES

Scott L. Johnson of Topeka, Kansas, appeared for claimant. Matthew S. Crowley of Topeka, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record in this request for medical benefits is listed in the Post Award Medical Order.

ISSUES

This is a post-award request for assisted living at a care facility where claimant would receive help with meal preparations, bathing and laundry. After conducting a hearing on April 17, 2003, Judge Avery entered the July 1, 2003 Post Award Medical Order, which provided, in part:

The court finds that the natural and probable consequence of claimant's work related accident requires that he be provided assisted living by the respondent and its insurance carrier. Because the court has been presented with a number of

alternatives regarding claimant's needs, and the court does not have direct contact with the claimant, the court appoints Debra Elandson *[sic]*, medical case manager, to make a recommendation to the court regarding the placement of Mr. Butler into an assisted living facility. Before making said recommendation, Ms. Elandson *[sic]* may consult the court, Mr. Butler and any parties she deems necessary. Any assisted living facility in which Mr. Butler is placed should provide adequate care for claimant's incontinence problem, meal preparation, bathing and laundry.

The recommendation shall be made available to the court and the parties within 30 days of this order with extensions for good cause.

All costs, including Ms. Elandson's *[sic]* fee, if any, concerning the placement of Mr. Butler are to be paid by the respondent and its insurance carrier. Mr. Crowley is directed to refer the *[sic]* Ms. Elandson *[sic]* to the court.

Respondent and its insurance carrier contend Judge Avery erred. Respondent and its insurance carrier agree that claimant should be placed into an assisted living facility. But they contend the Judge erred by failing to determine what portion of the costs of the assisted living facility should be considered reasonable and necessary medical expense for which they were responsible. Accordingly, respondent and its insurance carrier request this Board to reverse the July 1, 2003 Post Award Medical Order and to deny claimant's request for assisted living. Respondent and its insurance carrier's brief to the Board concludes, as follows:

Even though respondent/insurance carrier agrees that claimant should be placed into an assisted care facility, it has been unable to reach an amenable resolution with the claimant on the issue of apportioning the medical versus non-medical costs of such placement. As such the claimant has moved forward in litigating this claim without producing the necessary evidence concerning the apportionment of costs. By granting the placement in assisted care entirely at the cost of respondent/insurance carrier, the administrative law judge has exceeded his authority in awarding benefits which are not covered under the Workers' Compensation Act by granting the claimant's placement in assisted care without determining the apportionment of costs. Respondent/Insurance Carrier have no alternative but to request that the Post Award Medical Order issued by Judge Avery on July 1, 2003 be reversed and the request be denied.

Conversely, claimant contends the Post Award Medical Order should be affirmed. Claimant argues the Judge did not apportion the costs between medical and non-medical expense in an assisted living facility as such apportionment is not possible. Claimant also argues that many of the expenses that respondent and its insurance carrier label as non-medical items should be considered as a medical expense in the context of this claim.

The only issues before the Board on this appeal are:

1. Did the Judge err in ordering claimant's placement in an assisted living facility?
2. Is this appeal premature?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and after considering the parties' arguments, the Board finds and concludes that this appeal is premature and, therefore, should be dismissed.

Respondent and its insurance carrier initiated this appeal based upon the contention that the Judge ordered them to pay the entire cost incurred of claimant's residing in an assisted living facility. But the Board does not construe the July 1, 2003 Post Award Medical Order in that manner. Instead, the Board construes the order to require claimant's medical case manager to recommend an appropriate facility to the Judge. As the Judge has not determined what assisted living facility is appropriate for claimant and has not determined how the related costs should be borne, this appeal is premature.

AWARD

WHEREFORE, the Board dismisses respondent and its insurance carrier's appeal.

IT IS SO ORDERED.

Dated this ____ day of August 2003.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Scott L. Johnson, Attorney for Claimant
Matthew S. Crowley, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director